

**STATE OF SOUTH CAROLINA  
BEFORE THE PUBLIC SERVICE COMMISSION  
DOCKET NOS. 2017-207-E; 2017-305-E; 2017-370-E**

In the Matter of: Friends of the Earth and  
Sierra Club, Complainant/Petitioner v. South  
Carolina Electric & Gas Company,  
Defendant/Respondent

In the Matter of: Request of the Office of  
Regulatory Staff for Rate Relief to South  
Carolina Electric & Gas Company's Rates  
Pursuant to S.C. Code Ann. § 58-27-920

In the Matter of: Joint Application and  
Petition of South Carolina Electric & Gas  
Company and Dominion Energy,  
Incorporated for Review and Approval of a  
Proposed Business Combination between  
SCANA Corporation and Dominion Energy,  
Incorporated, as May Be Required, and for a  
Prudency Determination Regarding the  
Abandonment of the V.C. Summer Units 2 &  
3 Project and Associated Customer Benefits  
and Cost Recovery Plans

**AARP'S MEMORANDUM IN  
OPPOSITION TO JOINT APPLICANTS'  
MOTION FOR DECLARATORY  
RULINGS AND MOTION IN LIMINE**

**INTRODUCTION**

Intervenor AARP submits the following memorandum in opposition to Joint Applicants' Motion for Declaratory Rulings and Motion *In Limine* filed on October 1, 2018. Joint Applicants raise four arguments in support of their Motion. First, they argue that collateral estoppel precludes re-litigation of the Commission's prior decisions concerning the NND project. Second, they argue that the parties cannot challenge SCE&G's decision to avoid including contingency-based cost schedules in its BLRA filings. Third, they argue that the Commission is required to rule that all evidence and argument concerning the need for SCE&G to conduct post-2009 prudency reviews of the NND project is irrelevant. Finally, they argue that the Act 258 prudency standards cannot be applied retroactively. It appears that Joint Applicants' seek to exclude portions AARP's pre-

filed testimony only on the grounds raised in their first and third arguments.<sup>1</sup> Therefore, without waiving its right to meet Joint Applicants' remaining arguments at a later time, AARP will limit its response herein to Joint Applicants' first and third arguments.

## **ARGUMENT**

### **I. AARP is not Collaterally Estopped from Challenging the Prudence of the NND Costs SCE&G Incurred After 2009.**

Joint Applicants argue that AARP, and indeed all parties to this case, are precluded from challenging the prudence of SCE&G's decision to continue construction of the NND project because this Commission issued an order nearly a decade ago finding that SCE&G's decision to commence construction was prudent and reasonable based on information available to SCE&G at that time. Joint Applicants are mistaken for two reasons. First, the doctrine of collateral estoppel does not prevent AARP, which was not a party to the BLRA revised rate proceedings, from challenging the prudence of SCE&G's decisions to continue construction of the NND project because AARP did not have a full and fair opportunity to litigate this issue in prior proceedings. Second, Joint Applicants' interpretation of the BLRA would render it unconstitutional as applied.

#### **a. AARP did not have a Full and Fair Opportunity to Litigate the Prudence of SCE&G's Decision to Continue Construction of the NND Project in Prior BLRA Revised Rate Proceedings.**

Joint Applicants emphasize the fact that mutuality of parties is not required in order to invoke collateral estoppel and correctly note that this is true only where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue. State v. Hewins, 409 S.C. 93 (S.C., 2014). However, joint applicants fail to explain how AARP could have had such an opportunity in the BLRA revised rate proceedings. This is likely because no such opportunity existed.

The BLRA establishes a procedure by which a utility may seek modification of an initial base load review order based on changes to the construction schedule and may seek revised rates

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<sup>1</sup> See Exhibit 1 to Joint Applicants' Motion for Declaratory Rulings and Motion *In Limine*, p. 2

which result from these changes. S.C. Code § 58-33-270(E). This procedure fails to provide SCE&G's customers, including AARP and its members, with any meaningful opportunity to challenging the prudence of the utility's decisions subsequent to the initial base load review order for several reasons.

First, the BLRA does not provide an opportunity for customers to challenge a utility's application for revised rates except by submitting written comments to the Office of Regulatory Staff ("ORS") within one month of the revised rates filing. S.C. Code Ann. § 58-33-280(C). Second, the BLRA requires the revised ratemaking process to be completed within four months of the utility's application and does not contemplate a hearing prior to adoption of revised rates. S.C. Code Ann. § 58-33-280(F) (requiring the Commission to issue a revised rates order within 4 months of application); S.C. Code Ann. § 58-33-240(C) (failing to provide for a hearing). Third, after revised rates are adopted, a customer's only remaining opportunity to challenge the revised rates order under the BLRA is by filing a petition to intervene within 30 days after that order is issued. S.C. Code Ann. § 58-33-285. This intervention would begin a new revised rates proceeding with same procedural defects mentioned above. S.C. Code § 58-33-285(E). Finally, the BLRA does not guarantee that a customer would actually have 30 days in which to challenge the revised rates order. The utility is only required to notify its customers that a revised rates order has been issued in its next billing. S.C. Code § 58-33-280(H). Because a customer's time to intervene starts to run once the revised rates order is issued, but their notice of the revised rates order is tied to the utility's billing cycle, customers will almost certainly have less than 30 days to intervene and may have no practical opportunity to do so.

The BLRA simply does not provide an adequate procedure for customers to be heard in revised rates proceedings. As a result, SCE&G's customers, including AARP and its members, have never had a full and fair opportunity to litigate the prudence of SCE&G's decisions to continue construction of the NND project post-2009 and should not be barred from doing so in these proceedings. Further, since the doctrine of collateral estoppel "is grounded upon concepts of fairness, it should not be rigidly or mechanically applied." State v. Bacote, 331 S.C. 328, 331 (S.C., 1998). "Thus, even if all the elements for collateral estoppel are met, when unfairness or

injustice results or public policy requires it, courts may refuse to apply it." Carolina Renewal v. Dept. of Transp., 385 S.C. 550, 555 (S.C. App., 2009) (Citing State v. Bacote, 331 S.C. at 331).

b. Joint Applicants' Interpretation of the BLRA Renders it Unconstitutional as Applied.

Should the Commission accept Joint Applicants' interpretations of the BLRA and the doctrine of collateral estoppel, then the procedural defects which have prevented ratepayers from challenging SCE&G's applications for revised rates render the BLRA unconstitutional as applied. Both the unconstitutionality of the BLRA as applied to SCE&G's ratepayers and the Commission's authority to issue a ruling to that effect have been thoroughly briefed by other parties and those arguments need not be repeated in full here. *See e.g.* Brief of Attorney General in Opposition to SCE&G's Motion to Dismiss, filed Nov. 21, 2017 in dkt. 2017-305-E.

AARP concurs in the Attorney General's analysis for the purpose of these consolidated dockets and urges the Commission not to foreclose the parties' ability to hold SCE&G to account for its imprudent use of billions of dollars extracted from captive ratepayers. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." South Carolina Dep't of Social Serv. v. Beeks, 325 S.C. 243, 246 (S.C., 1996). Joint Applicants would have this Commission believe that the time for a meaningful hearing on these issues is never. AARP submits that time is now.

**II. Evidence, Testimony, and Arguments Concerning the Need for SCE&G to Conduct Post-2009 Prudency Reviews of the NND Project are Relevant in these Dockets.**

Joint Applicants argue that S.C. Energy Users Comm. v. S.C. Elec. & Gas, 410 S.C. 348, (S.C., 2014) (hereinafter "S.C. Energy Users II") requires this Commission to disregard and deem irrelevant evidence tending to establish that SCE&G's continuation of the NND project after 2009 was imprudent. Joint Applicants attempt to use S.C. Energy Users II to shield them not only from a challenge to the prudency of commencing the NND project but from any challenge to the prudency of any decisions related to the NND project, including its abandonment. Neither the BLRA nor S.C. Energy Users II support this result.

In S.C. Energy Users II, appellants challenged, *inter alia*, the Commission's holding that "[r]eopening *initial* prudency determinations each time a utility is required to make an update filing would create an outcome that the BLRA was intended to prevent and would defeat the principal legislative purpose in adopting the statute." S.C. Energy Users II, 410 S.C. at 360 (emphasis added). The South Carolina Supreme Court agreed with the Commission and adopted its logic holding that "we find Appellants' argument that the Commission should have conducted a prudency evaluation of the *entire* construction project at this modification stage unavailing." Id (emphasis added). In short, S.C. Energy Users II held that the prudency determination contained in an *initial* base load review order was shielded from challenge in subsequent modification proceedings. This holding does not go so far as Joint Applicants claim because AARP is not seeking to reopen the prudency determination contained in the Commission's initial 2009 base load review order and these consolidated dockets are not modification proceedings under S.C. Code Ann. § 58-33-270(E). The Joint Applicants would have this Commission believe that a prudency determination about commencing the NND project construction precludes *any* subsequent review of prudence involved with the management of the project. Instead, these proceedings involve, among other things, the abandonment of the NND project and Joint Applicants attempt to recover costs associated therewith through rates. The BLRA expressly contemplates a prudency review of SCE&G's abandonment decision and places the burden of proving that the abandonment decision was prudent on SCE&G. S.C. Code Ann. § 58-33-280(K).

SCE&G has not been immunized from the Commission's review of the evidence in this matter regarding the utility's allegedly imprudent, unreasonable, and fraudulent behavior in the implementation and management of the authority that had been granted to commence the NND project. In fact, the Commission has an overriding obligation to ensure that prospective rates are no higher than what the evidence can support as "just and reasonable" going forward.

Joint Applicants' attempt to use S.C. Energy Users II to avoid demonstrating to this Commission and SCE&G's ratepayers that the decision to abandon the NND project was prudent is a transparent effort to read their statutory obligations out of existence. This Commission should not be swayed.

## CONCLUSION

SCE&G's customers cannot afford, and do not deserve, to pay for SCE&G's mistakes, mismanagement, and misrepresentation. In their Motion, Joint Applicants attempt to shield every decision SCE&G has made concerning the NND project behind an order issued nearly a decade ago. They argue that the constitutionally-suspect BLRA prevents the parties to these dockets from having any meaningful opportunity to challenge decisions which have resulted in billions of dollars extracted from captive ratepayers being squandered on a project which will never light a single home. They argue that ratepayers should continue to pay not only for the cost of the now-abandoned NND project, but that ratepayers should pay a profit margin on top of these costs. AARP and numerous other parties in these dockets seek to represent the public interest in opposing these efforts. That interest is best served through a transparent and public proceeding in which SCE&G's decisions regarding the NND project are subject to close scrutiny by this Commission and in which SCE&G bears the burden to show that its decision to abandon the NND project was prudent. That interest is best served by denying Joint Applicants' Motion for Declaratory Rulings and Motion in Limine.

Respectfully Submitted,

SOUTH CAROLINA APPLESEED LEGAL JUSTICE CENTER

October 29, 2018

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**CERTIFICATE OF SERVICE**

I certify that on October 29, 2018 a copy of the foregoing **AARP'S MEMORANDUM IN OPPOSITION TO JOINT APPLICANTS' MOTION FOR DECLARATORY RULINGS AND MOTION IN LIMINE** was served upon all parties to these consolidated dockets by electronic mail.

s/ Adam Protheroe